CHAN YEE

v.

CHAN YOKE FONG

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-314 OF 1989]
1 AUGUST 1990

CIVIL PROCEDURE: *Appeal to Supreme Court - Leave - Whether can reverse earlier decision on same point - Relevant principles - Doctrine of per incuriam.*

CIVIL PROCEDURE: *Whether respondent can join another party to proceedings - As co-defendant or third party - Order 15 r. 6 of Rules of High Court 1980.*

Both parties were involved in a motorcycle collision whereby the pillion-rider died. The appellant A, the father of the deceased pillion-rider, sued the respondent, R for damages as a defendant for himself and his wife; R applied by summons for leave to join the motorcyclist (of the pillion rider) under O. 15 r. 6 of the Rules of the High Court 1980 (RHC). This application was dismissed by Anuar J on 4 September 1987 on the ground that the proper procedure was to make the motorcyclist a third party. R successfully appealed against this decision; A now appeals against the granting of R's application.

The issue for the Court was whether the case of *Hee Awa v. Syed Muhammad Sazalay*, an earlier decision of the Supreme Court, on O. 15 r. 6 should be followed or reversed; the appellant's submission being that the *Hee Awa* case was decided *per incuriam* as firstly cases which should have been referred to were not and secondly that the Supreme Court had construed O. 15 r. 6 of the RHC wrongly.

Held:

[1] In the general interest of certainty in the law the Court must act cautiously and be very sure of its grounds before reversing its own earlier decision.

[2] After careful considerations of the judgment in the *Hee Awa* case which dealt comprehensively with the contentions of the parties, the Court is unable to say that there is any error in that decision.

[3] The Court cannot accept the contention of the appellant that it is open to this Court to disregard an earlier decision of its own whenever it is made to appear that the Court did not have, on the earlier occasion, the benefit of the best argument that the research and intensity that Counsel could provide; such a proposition would open the floodgate to numerous and costly attempts to re-open questions which have been authoritively decided.

[Appeal dismissed.]

Cases referred to:

Hee Awa & Ors. v. Syed Muhammad Sazaly & Anor. [1988] 1 MLJ 300
Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ (Rep) 63
T.Order Thomas v. K.C.I. Reddy & Anor. [1974] 2 MLJ 87
White v. Carrara Ceiling Company Ltd. [1944] NZLR 577
McCheane v. Gyles (No. 2) [1902] 1 Ch 911

Courtney v. Woods [1946] NZLR 350
Atid Navigation Co. Ltd. v. Fairplay Towage & Shipping Co. Ltd. [1955] 1 All ER 698
Hordern-Richmond Ltd. v. Duncan [1947] 1 KB 545
Leaver v. Transport (Nelson) Ltd. [1960] NZLR 44
Gurtner v. Circuit [1968] 2 QB 587
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52
Huddersfield Police Authority v. Watson [1947] 2 All ER 193
Morelle Ltd. v. Wakeling [1955] 1 All ER 708; [1955] 2 QB 329
Miliangos v. George Frank (Textiles) Ltd. [1975] 1 All ER 1076
Re United Railways of the Havana and Regla Warehouses Ltd. [1960] 2 All ER 332
Schorsch Meier GmbH v. Hennin [1975] 1 All ER 152
Young v. Bristol Aeroplane Co. [1944] 2 All ER 293; [1944] KB 718
Joscelyne v. Nissen [1970] 1 All ER 1213 [1970] 2 QB 86
Barrington v. Lee [1971] 3 All ER 1231 [1972] 1 QB 326
Miliangos case [1975] 3 All ER 801

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Civil Procedure Code [New Zealand], r. 90
Rules of the High Court 1980, O. 15 r. 6, O. 15 r. 6(2)(b), O. 16

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., Vol. I, p. 110
Supreme Court Practice 1979, Vol. I, p. 176
Rules of the Supreme Court 1979, Vol. I, p. 183

For the appellant - Khoo Eng Chin (Hira Singh & Harbans Singh with him); M/s. Sandu & Co.
For the respondent - Jagjit Singh; M/s. Jagjit Singh & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

Ostensibly this appeal is against the decision of Peh Swee Chin J when in fact it is an indirect way of challenging the decision of this Court in *Hee Awa & Ors. v. Syed Muhammad Sazaly & Anor.* [1988] 1 MLJ 300.

The facts may be stated shortly. The respondent/defendant was the rider of motorcycle AAR 7461. Lee Hoy Mun was the rider of another motorcycle AAS 4483 with a pillion rider. The two motorcycles were involved in a collision resulting in the death of the pillion rider. The appellant/plaintiff, father of the deceased pillion rider sued the respondent for damages as a defendant for himself and his wife, the mother of the deceased pillion rider. The respondent applied by summons for leave to bring in Lee Hoy Mun as a co-defendant under O. 15 r. 6 of the Rules of the High Court 1980 (referred to as RHC).

In making the order Peh Swee Chin J considered himself bound by the *Hee Awa* case. In that case there was an accident involving a motorcycle and a Government motor van in which the pillion rider of the motorcycle was killed and the passenger in the motor van was injured. The injured passenger claimed damages for negligence against the motorcyclist in the Sessions Court and the van driver and the Government of Malaysia were made third parties. The parents of the deceased pillion rider claimed damages under ss. 7 and 8 of the Civil Law Act 1956 in the High Court against the van driver and the Government of Malaysia. The respondent applied under O. 15 r. 6(2)(b) of RHC for leave to make the motorcyclist a co-defendant. The Senior Assistant Registrar dismissed the application. The High Court allowed the appeal and

ordered the motorcyclist to be made a co-defendant. In dismissing the appeal, Azmi SCJ delivering the judgment of the Court, held that the respondent's application fell squarely within O. 15 r. 6(2)(b) of the RHC; that the respondent had a choice to proceed either under O. 15 r. 6(2)(b) or O. 16 of the RHC; that there was nothing in the RHC to prevent the respondent from making the choice; that the order so made was to ensure that all matters in dispute might be effectually and completely determined and adjudicated upon as envisaged by O. 15 r. 6(2)(b) of the RHC and that the learned Judge had exercised his discretion properly.

We would mention that earlier on 24 April 1987 respondent had applied to the High Court for an order to make the motorcyclist a co-defendant. The application came before Anuar J on 4 September 1987 and he dismissed it holding that the proper procedure was to make the motorcyclist a third party. However, the appeal against his decision was allowed on 19 July 1988. So that the application before Peh Swee Chin J was the second time the matter came before the High Court.

Encik Khoo Eng Chin, Encik Hira Singh and Encik Harbans Singh appeared for the appellant and Encik Jagjit Singh for the respondent. Encik Khoo stated that the *Hee Awa* case was decided *per incuriam* and the burden was on him to show that it was so. First, it is his submission that this Court can review its own decision if the decision was made *per incuriam.* For this proposition *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ (Rep) 63 and *T.O. Thomas v. K.C.I. Reddy & Anor.* [1974] 2 MLJ 87 were cited in support. Secondly, it was contended that the *Hee Awa* case was not properly argued as cases which should have been referred to were not. Two New Zealand cases were cited to show that the Courts were reluctant to make a person a co-defendant if the plaintiff opposed such an application. In *White v. Carrara Ceiling Company Ltd.* [1944] NZLR 577 the plaintiff brought an action to recover damages under the Deaths by Accidents Compensation Act 1908 against the defendant company in respect of the death of her husband, an employee of the company. The defendant applied for the B. company to be added as defendant, on the ground that the B. company was permitted to use the fireroom in which the deceased was killed and to install certain machinery. Held that the liability of the B. company was not a question involved in the action within the meaning of r. 90 of Code of Civil Procedure, and that the presence of the B. company before the Court was not necessary within the purview of that rule. Myer CJ stated at p. 579 that:

> It is to be observed that the present application is made not by the plaintiff but by the defendant, and that it is not an application for the issue of a third-party notice under r. 95, but an application under r. 90 to add a new defendant.

He went on later to say that:

> ... speaking generally, an order on an application by a defendant for the addition of a new defendant is not made where the plaintiff opposes and is not himself prepared to apply for the joinder of the proposed new defendant: *McCheane v. Gyles* (No. 2) [1902] 1 Ch 911.

The other New Zealand case is that of *Courtney v. Woods* [1946] NZLR 350. In that case the plaintiff, a dairy farmer, sued the defendant, a solicitor, for damages for alleged negligence in the management of his affairs while he was overseas on active service. The defendant applied to join as co-defendants the lessees in succession of the plaintiff's farm in order that, if the defendant were guilty of negligence causing damage to the plaintiff, the Court might determine what amount of contribution they ought to make to the defendant. In dismissing the application, Cornish J held that the joinder should not be made as the plaintiff should be allowed to proceed against the defendant of his choice. At p. 355 he stated that:

> In the present case, the question raised by plaintiff is the extent of the defendant's liability to him. Whether defendant has a claim over against the lessees is of no interest to him. If defendant has neglected plaintiff's affairs and so caused loss to him, he must recompense him in the measure of that loss. Plaintiff says that he is entitled to judgment for the full amount claimed from the defendant regardless of any rights that defendant may have against others. That was said by the plaintiff in *McCheane's* case, and he was allowed to proceed against the defendant of his choice. In my opinion, that case is indistinguishable from the present ...

In *McCheane v. Gyles* (No. 2) G and C. were the trustees of a settlement. C died, and X, his legal personal representative, lived in Ireland. M, the *cestui que* trust, brought an action against G, alleging a breach of trust by him and C, and claiming payment by G. of the amount lost by the breach. A third-party notice, by which G. claimed contribution from the estate of C, and the order giving leave to serve it on X. in Ireland, were set aside by the Court of Appeal without prejudice to an application by G, under O. XVI, r. 11 to add X. as a defendant to the action. The plaintiff opposed the application. Held that X. ought not to be added as a defendant against the plaintiff's wish. Buckley J remarked at p. 913 that:

> Where there is a joint and several liability and one of the persons liable is sued, what power have I to make the plaintiff join the other person? Supposing I did so, how could I make him allege anything against or claim anything from the new defendant?

He did, however, make a pertinent observation when he said at p. 917 that:

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he 'ought to have been joined,' or that his 'presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.'

Atid Navigation Co. Ltd. v. Fairplay Towage & Shipping Co. Ltd. [1955] 1 All ER 698 and *Hordern-Richmond Ltd. v. Duncan* [1947] 1 KB 545 were also cited in support of the same principle.

The *Atid Navigation* case was applied in *Leaver v. Transport (Nelson) Ltd.* [1960] NZLR 44 where the plaintiff's husband, driving one of the defendant company's trucks was involved in a collision on the main highway with another of the defendant company's trucks driven by S The plaintiff's husband died and the plaintiff sued the defendant company. S. notified the defendant company that he proposed to sue the defendant company in respect of his personal injuries due to the deceased driver's negligence. The defendant company applied to have S joined as a defendant under r. 90 of the Code of Civil Procedure. Held that while it would be convenient to have S before the Court as a party, such a course was unnecessary to enable the Court to adjudicate upon the questions involved in the action, as it was not necessary for the determination of the issues as pleaded between the plaintiff and the defendant company; and that, accordingly, an order for joinder under r. 90 of the Code of Civil Procedure would not be made.

Encik Khoo submitted that r. 90 of the New Zealand Code of Civil Procedure is substantially the same as the English O. 15 r. 6(2) and our O. 15 r. 6(2)(b) of RHC. In the *Hee Awa* case Azmi SCJ stated that:

The respondents have a choice in this circumstance to proceed either under O. 15 r. 6(2)(b) or O. 16. There is absolutely nothing in the Rules of the High Court 1980 to prevent the respondents from making the choice. In our view, the rule does not affect the rights of a plaintiff to procure his remedy against any particular joint tortfeasor of his choice.

Encik Khoo complained that by virtue of the decision in the *Hee Awa* case the plaintiff was being compelled to make another person whom he did not wish to sue to be a co-defendant. He contended that Azmi SCJ was wrong to say that there was no rule to prevent the respondents making a choice. Reference was made to *Mallal's Supreme Court Practice*, 2nd Edn., Vol. I, p. 110 under the heading of Joinder of Parties. Order 15 r. 4(3) provides:

Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action ...

Continuing at p. 112 under the heading of Joinder of joint defendants it is stated:

Paragraph (3). The plaintiff has the option to join all persons jointly or severally liable or not. If he does not, the defendant cannot compel him to do so but if he so desires, he may join in these other persons jointly and severally liable with him, as third parties under O. 16. A third party order in such circumstances will be made. But where the persons are liable jointly and not severally, the Court may require all such persons to be joined in as defendants and in the meanwhile, stay all proceedings.

The *Supreme Court Practice* 1979, Vol. I, p. 176 makes the following comments:

Joinder of joint defendants. Paragraph (3), *supra*, was new in the RSC (Rev.), 1962, but it codified the law and practice relating to the joinder of parties who are jointly liable.

Where the liability of two or more persons is several as well as joint, the plaintiff may choose which of them to sue, and he need not join in the action the other persons also liable; and in such case, the defendant cannot compel the plaintiff to join the other persons liable with him. He must, if necessary, apply to join other such persons as third parties: see O. 16 infra.

On the other hand, where the liability of two or more persons is joint only, and is not several also, the plaintiff should join all the persons so liable as defendants in the one action, and if he does not do so, and sues only one of several persons jointly liable, such defendant may apply for an order to stay the proceedings unless and until the other persons jointly liable with him are added as co-defendants in the action.

It is the submission of the appellant that only the co-defendant himself, as an invervener, could apply to be a co-defendant under O. 15 r. 6(2). At p. 301 in the *Hee Awa* case Azmi SCJ referred, with approval, to the wider interpretation of O. 15 r. 6(2)(b) as enunciated in *Gurtner v. Circuit* [1968] 2 QB 587 and the test formulated by the Privy Council in *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52. He pointed out that:

The only real issue in this appeal is whether the learned Judge has exercised his discretion on correct principles. Although the application before him is not made by an intervener, but by the respondents who are already defendants in this action, the same test should apply ...

The main object of the rule is to prevent multiplicity of proceedings. Under the rule the Court has a very wide discretion to make the order that he made so that all matters in dispute could be effectually and completely determined and adjudicated upon.

Encik Hira Singh who appeared with Encik Khoo rightly pointed out that in *Cheah Fook Chuan v. Chai Chan Poh* (SC Civil Appeal No. 24 of 1987) this Court upheld Anuar J's decision which was in the appellant's favour. However, we must stress that Azmi SCJ in the *Hee Awa* case has explained that the dismissal of the appeal in the *Cheah Fook Chuan* case was because of insufficient material on the affidavit in support of the application on which the discretionary power could have been exercised.

In answer to the appellant Encik Jagjit Singh submitted that *Government of Malaysia v. Lim Kit Siang* and *T.O. Thomas v. K.C.I. Reddy & Anor.* did not lay down any principle that the Supreme Court could review its own previous decision. As regards the New Zealand cases he contended that r. 90 of the New Zealand Code of Civil Procedure was not in *pari materia* with our relevant rule. The other cases cited are mostly not running down cases and are therefore distinguishable. Also, the English cases heard before 1957 referred to O. 16 r. 11 under the old rule. In the instant case the relevant provision is O. 15 r. 6(2)(b) of the RHC. He said the *Pegang Mining* case was a decision based on the old Rule.

Reference was also made to the Rules of the Supreme Court 1979, Vol. I, p. 183 under the heading of intervention by persons not parties where it is stated in relation to O. 15 r. 6:

Under this rule, however, a person who is not a party may be added as defendant against the wishes of the plaintiff either on the application of the defendant or on his own intervention, or in rare cases by the Court of its own motion. The jurisdiction of the Court under this rule is entirely discretionary.

Encik Jagjit Singh said he relied on this and submitted that the *Hee Awa* case was decided correctly. The rationale of the case is that all matters should be decided and adjudicated in one trial. Further, Peh Swee Chin J exercised his discretion correctly. It is not the fault of the Court that some cases were not cited and that the *Hee Awa* case should not be questioned on the facts of the particular case.

It is said that the *Hee Awa* case was decided *per incuriam* because some cases were not referred to the Court and the Court construed the rule wrongly. In *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 Lord Goddard CJ explained it in these words:

What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the Court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

Holding almost the same view Evershed MR in *Morelle Ltd. v. Wakeling* [1955] 1 All ER 708/[1955] 2 QB 329 stated at p. 718:

As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, ... , of the rarest occurrence ...

In the general interest of certainty in the law we must act cautiously and be very sure of our grounds before reversing an earlier decision of our own. Out of respect for the parties we have dealt with their important submissions. The main attack of the appellant is that some cases were not cited to this Court, therefore the *Hee Awa* case was decided *per incuriam.* This very point was dealt with by the Court of Appeal in *Miliangos v. George Frank (Textiles) Ltd.* [1975] 1 All ER 1076 where, at first instance, Bristow J was confronted with the decision of the House of Lords in *Re United Railways of the Havana and Regla Warehouses Ltd*. [1960] 2 All ER 332 and the decision of the Court of Appeal in *Schorsch Meier GmbH v. Hennin* [1975] 1 All ER 152. Bristow J decided to follow the *Havana* case and held that the *Schorsch Meier* case was given *per incuriam*. The Court of Appeal held

that he was wrong and that he should have applied the *Schorsch Meier* case by which they themselves were also bound. The House of Lords, with Lord Simon of Glaisdale dissenting, dismissed the appeal.

It is interesting to note that Lord Denning was a member of the House of Lords in the *Havana* case and expressed emphatically that:

> And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States Courts give judgments in sterling ...

He has since, in the light of developments, taken a diametrically opposite view.

On the question of *per incuriam* Lord Denning in the *Miliangos* case stated at p. 1084 that:

> Another exception is where a previous decision has been given *per incuriam.* 'Such cases', said Lord Greene MR in *Young v. Bristol Aeroplane Co.* [1944] 2 All ER 293/[1944] KB 718 would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.' So it has been held that a decision is not given *per incuriam* because the argument was not 'fully or carefully formulated' (see *Morelle v. Wakeling*), or was 'only weakly or inexpertly put forward' (*Joscelyne v. Nissen* [1970] 1 All ER 1213 at 1223/[1970] 2 QB 86 & 89; nor that the reasoning was faulty (*Barrington v. Lee* [1971] 3 All ER 1231 at 1245/[1972] 1 QB 326 at 345 by Stephenson LJ). To these I would add that a case is not decided *per incuriam* because Counsel have not cited all the relevant authorities or referred to this or that rule of Court or statutory provision. The Court does its own researches itself and consults authorities; and these may never receive mention in the judgments. Likewise a case is not decided *per incuriam* because it is argued on one side only and the other side does not appear. The duty of Counsel in those circumstances, as we all know, is to put the case on both sides to the best of his ability; and the Court itself always examines it with the utmost care, to protect the interests of the one who is not represented. That was done in the *Schorsch Meier* case itself.

Although Lord Simon of Glaisdale dissented in the *Miliangos* case [1975] 3 All ER 801 in the House of Lords he agreed with Lord Denning in respect of the *per incuriam* doctrine subject to three riders. He said at page 821:

> I respectfully agree with what Lord Denning MR said in the instant case about this aspect of the *per incuriam* doctrine, subject to three riders. First, where a 'Court does its own researches itself', as it often will and sometimes must, it should proceed with special caution since it is thereby acting without the benefit of adversary argument. Secondly, where such research throws up an authority or argument which is material (even if only to be finally distinguished or rejected), it is better that it should be mentioned in the judgment, for the benefit of those who have subsequently to consider the judgment. Thirdly, although certainly a case is not decided *per incuriam* merely because it is argued on one side only (as Schorsch Meier was), the absence of a contrary argument will sometimes make it easier to establish a *per incuriam* exception, and in any case a judgment in undefended proceedings or a decision on an uncontested issue tends to have less authority than one given after argument on both sides.

It is necessary to bear in mind that the question before this Court in the *Hee Awa* case was one of the true interpretation of a particular provision of RHC. We have carefully considered the judgment in that case which dealt comprehensively with the contentions of the parties.

We are unable to fasten on any part of the decision under consideration and to say that there is any slip or error. If we are to accept the contention of the appellant it would necessarily make the proposition that it is open to this Court to disregard an earlier decision of its own whenever it is made to appear that the Court has not, on the earlier occasion, the benefit of the best argument that the researches and industry that Counsel could provide. Such a proposition would open the floodgate to numerous and costly attempts to re-open questions which have been authoritatively decided.

For reasons given we would dismiss the appeal with costs both here and the Court below. Deposit to respondent to account of taxed costs.

Also found at [1990] 2 CLJ 737